

1 At some point, Defendant MGC Mortgage, Inc. ("MGC") became the
2 mortgage loan servicer. (Id. ¶ 14.) On or about May 3, 2016,
3 submitted a loan modification application to MGC. (Id. ¶ 17.)
4 Plaintiffs allege that they requested, but were not assigned, a
5 single point of contact. (Id. ¶ 27.) Plaintiffs also allege that
6 they did not receive a written acknowledgment of their application
7 within five business days of submitting it to MGC. (Id. ¶¶ 33-34.)
8 At some unspecified time, MGC denied Plaintiffs a loan
9 modification. (Id. ¶ 46.)

10 Plaintiffs' original Complaint was dismissed with leave to
11 amend. (Dkt. No. 26, Order Granting Defendants' Motion to Dismiss
12 "Order") at 10.) Plaintiffs then filed their FAC alleging four
13 causes of action: (1) violation of California Civil Code section
14 2923.7, (2) violation of California Civil Code section 2924.10, (3)
15 negligence, and (4) violation of California Business and
16 Professions Code section 17200. Defendants now move to dismiss the
17 FAC.

18 **II. Legal Standard**

19 A complaint will survive a motion to dismiss when it contains
20 "sufficient factual matter, accepted as true, to state a claim to
21 relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S.
22 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,
23 570 (2007)). When considering a Rule 12(b)(6) motion, a court must
24 "accept as true all allegations of material fact and must construe
25 those facts in the light most favorable to the plaintiff." Resnick
26 v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint
27 need not include "detailed factual allegations," it must offer
28 "more than an unadorned, the-defendant-unlawfully-harmed-me

1 accusation." Iqbal, 556 U.S. at 678. Conclusory allegations or
2 allegations that are no more than a statement of a legal conclusion
3 "are not entitled to the assumption of truth." Id. at 679. In other
4 words, a pleading that merely offers "labels and conclusions," a
5 "formulaic recitation of the elements," or "naked assertions" will
6 not be sufficient to state a claim upon which relief can be
7 granted. Id. at 678 (citations and internal quotation marks
8 omitted).

9 "When there are well-pleaded factual allegations, a court should
10 assume their veracity and then determine whether they plausibly
11 give rise to an entitlement of relief." Id. at 679. Plaintiffs
12 must allege "plausible grounds to infer" that their claims rise
13 "above the speculative level." Twombly, 550 U.S. at 555.
14 "Determining whether a complaint states a plausible claim for
15 relief" is a "context-specific task that requires the reviewing
16 court to draw on its judicial experience and common sense." Iqbal,
17 556 U.S. at 679.¹

18 Although Rule 15 requires courts to "freely give leave when
19 justice so requires," Fed. R. Civ. P. 15, the Supreme Court has
20 held that "the grant or denial of an opportunity to amend is within
21 the discretion of the District Court." Foman v. Davis, 371 U.S.
22 178, 182 (1962). One justified reason for denying leave to amend is
23 the "repeated failure to cure deficiencies by amendments previously
24 allowed." Id.

25 **III. DISCUSSION**

27 ¹ Plaintiffs' discussion of the relevant standard does not
28 cite or discuss either Iqbal or Twombly, or any subsequent
authority.

1 A. California Civil Code § 2923.7

2 As explained in this Court's prior Order, California Civil
3 Code section 2923.7 requires mortgage servicers to establish a
4 "single point of contact" ("SPOC") for borrowers who request a
5 "foreclosure prevention alternative," such as a loan modification.
6 Cal. Civil Code § 2923.7(a). The SPOC must communicate with the
7 borrower about the application process, deadlines, missing
8 documents, and the current status of the foreclosure alternative.
9 Cal. Civil Code § 2923.7(b). However, California Civil Code §
10 2924.12(c) provides that a "mortgage servicer . . . shall not be
11 liable for any violation that it has corrected and remedied prior
12 to the recordation of a trustee's deed upon sale" Cal.
13 Civil Code § 2924.12(c).

14 As they did in their original Complaint, Plaintiffs allege
15 that they requested an SPOC and that Defendants did not provide
16 one. (FAC ¶ 27.) As in the original Complaint, however, the FAC
17 does not allege that any foreclosure activity has taken place, let
18 alone that a trustee's deed upon sale has been recorded. Nor do
19 Plaintiffs dispute Defendants' representation to the court that no
20 foreclosure activity, including the recording of a notice of
21 default, has occurred. Plaintiffs once again ignore Defendants'
22 arguments and make no mention of the Section 2924.12(c) bar.
23 Plaintiff's California Civil Code section 2923.7 claim is therefore
24 dismissed with prejudice.

25 B. California Civil Code § 2924.10

26 Plaintiffs' claim under California Civil Code section 2924.10
27 suffers, as it did in Plaintiffs' original Complaint, from the same
28 deficiency. As they did in their original Complaint, Plaintiffs

1 allege that Defendants did not provide them with a written
2 acknowledgment of the loan modification application. (FAC ¶ 33.)
3 California Civil Code section 2924.10 requires mortgage servicers
4 to provide written acknowledgment of a borrower's modification
5 application within five business days of receipt. Cal. Civ. Code §
6 2924.10(a). Once again, however, Plaintiffs continue to ignore
7 Defendants' arguments and California Civil Code section 2924.12(c).
8 Absent any allegations of foreclosure activity, Plaintiffs'
9 California Civil Code section 2924.10 claim is dismissed with
10 prejudice.

11 C. Negligence

12 As in their original Complaint, Plaintiffs allege a cause of
13 action for negligence against Defendants. (FAC ¶¶ 36-51.) The
14 elements of a negligence claim are (1) the existence of a duty to
15 exercise due care, (2) breach of that duty, (3) causation, and (4)
16 damages. Merrill v. Navegar, Inc., 26 Cal.4th 465, 500 (2001).
17 The "existence of a duty of care owed by a defendant to a plaintiff
18 is a prerequisite to establishing a claim for negligence." Nymark
19 v. Heart Fed. Savings & Loan Assn., 231 Cal. App. 3d 1089, 1095
20 (1991).

21 "[A]s a general rule, a financial institution owes no duty of
22 care to a borrower when the institution's involvement in the loan
23 transaction does not exceed the scope of its conventional role as a
24 mere lender of money." Nymark, 231 Cal. App. 3d at 1096. "[A]
25 loan modification is the renegotiation of loan terms, which falls
26 squarely within the scope of a lending institution's conventional
27 role as a lender of money." Lueras v. BAC Home Loans Servicing,
28 LP, 221 Cal. App. 4th 49, 67 (2013). Thus, a residential lender

1 does not owe "a common law duty of care to offer, consider, or
2 approve a loan modification, or to explore and offer foreclosure
3 alternatives." Id.

4 Nevertheless, "Nymark does not support the sweeping conclusion
5 that a lender never owes a duty of care to a borrower. Rather, the
6 Nymark court explained that the question of whether a lender owes
7 such a duty requires the balancing of the 'Biakanja factors.'" Alvarez v. BAC Home Loans Servicing, L.P., 228 Cal. App. 4th 941,
8 945 (2014) (internal alterations, quotations, and citations
9 omitted).² For instance, "a lender does owe a duty to a borrower
10 to not make material misrepresentations about the status of an
11 application for a loan modification" Lueras, 221 Cal. App.
12 4th at 68. Likewise, "where defendants allegedly agree[] to
13 consider modification of the plaintiffs' loans, the Biakanja
14 factors clearly weigh in favor of a duty." Alvarez v. BAC Home
15 Loans Servicing, L.P., 228 Cal. App. 4th at 948.

17 The Biakanja factors are: "[1] the extent to which the
18 transaction was intended to affect the plaintiff, [2] the
19 foreseeability of harm to him, [3] the degree of certainty that the
20 plaintiff suffered injury, [4] the closeness of the connection
21 between the defendant's conduct and the injury suffered, [5] the
22 moral blame attached to the defendant's conduct, and [6] the policy
23 of preventing future harm." Biakanja v. Irving, 49 Cal. 2d 647, 650
24 (1958); see also Nymark, 231 Cal. App. 3d at 1098 (applying the
25 Biakanja factors in determining whether a financial institution
26 owed a duty to a borrower-client).

28 ² Biakanja v. Irving, 49 Cal.2d 647 (1958).

1 In Lueras, the plaintiff alleged that defendants, the lender
2 and trustee, "had a duty to offer [him] a loan modification and
3 breached that duty by refusing to do so." Lueras v. BAC Home Loans
4 Servicing, LP, 221 Cal. App. 4th 49, 63 (2013). The Court of Appeal
5 disagreed and held that the Biakanja factors did not support
6 imposing a duty. Id. at 67. It reasoned that "[i]f the
7 modification was necessary due to the borrower's inability to repay
8 the loan, the borrower's harm, suffered from denial of a loan
9 modification, would not be closely connected to the lender's
10 conduct." Id. Likewise, "[i]f the lender did not place the borrower
11 in a position creating a need for a loan modification, then no
12 moral blame would be attached to the lender's conduct." Id.

13 In Alvarez, in contrast, the plaintiffs did not allege "that
14 defendants owed plaintiffs a duty to offer or approve a loan
15 modification." Alvarez, 228 Cal. App. 4th at 944. Instead, they
16 alleged that the defendant undertook to review the plaintiffs'
17 loans for a modification. Id. at 944. The plaintiffs further
18 alleged that the defendants breached that duty by, inter alia,
19 mishandling the application and failing to review it in a timely
20 manner. Id. at 945. The plaintiffs argued that because the
21 defendants agreed to consider the loan modification application,
22 the defendants owed the plaintiffs a duty to "exercise reasonable
23 care in [their] review." Id. The Court of Appeal agreed. Id. at
24 948. Applying the Biakanja factors, the court reasoned that (1)
25 "[t]he transaction was intended to affect the plaintiffs," (2) "it
26 was entirely foreseeable that failing to timely and carefully
27 process the loan modification applications could result in
28 significant harm to the applicants[,] " (3) "the plaintiffs alleged

1 the mishandling of their application caused them loss of title to
2 their home among [and] deterrence from seeking other remedies . .
3 .[,]" (4) the mishandling of the documents deprived Plaintiff of
4 the possibility of obtaining the modification, (5) the plaintiffs
5 had little ability to protect their interests because "the bank
6 holds all the cards[,]" (6) the California Homeowner Bill of Rights
7 "demonstrates a rising trend to require lenders to deal reasonably
8 with borrowers in default to try to effectuate a workable loan
9 modification." Id. at 948-50 (internal quotations and citations
10 omitted).

11 As explained in this Court's prior Order, California district
12 courts, like California state courts, have reached differing
13 conclusions regarding whether a duty of care exists in the loan
14 modification context. See, e.g., Griffin v. Green Tree Servicing,
15 LLC, No. CV 14-09408 MMM, 2015 WL 10059081 at *14 (C.D. Cal. Oct.
16 1, 2015) (noting split and concluding no duty exists); see also
17 Robinson v. Bank of Am., No. 12-CV-494-RMW, 2012 WL 1932842, at *7
18 (N.D. Cal. May 29, 2012); Ansanelli v. JP Morgan Chase Bank, N.A.,
19 No C 10-3892 WHA, 2011 WL 1134451, at *7 (N.D. Cal. Mar. 28, 2011);
20 Watkinson v. MortgageIT, Inc., No. 10-CV-327-IEG, 2010 WL 2196083
21 (S.D. Cal. June 1, 2010); Garcia v. Ocwen Loan Servicing, LLC, No.
22 C 10-290 PVT, 2010 WL 1881098, at *1-3. (N.D. Cal. May 10, 2010).
23 In dismissing Plaintiff's original Complaint, this court observed
24 that Plaintiffs failed to discuss how the specific facts of this
25 case apply to the Biakanja factors, and that the court could
26 therefore not conclude that MGC owed Plaintiffs a duty of care.
27 (Order at 8-9.)
28

1 MGC argues once more that this court should follow Lueras
2 rather than Alvarez, and contends that all six Biakanja factors
3 weigh against the finding of a duty under the circumstances here.
4 (Mot. at 6-8.) Plaintiffs, represented by counsel, assert the
5 opposite. (Opposition at 12.) Although Plaintiffs identify the
6 relevant factors, their opposition only argues that the first and
7 second factors, namely the extent to which the transaction was
8 intended to affect the plaintiffs and the foreseeability of harm to
9 them, weigh in favor of a duty. (Id. at 12:21-25.)

10 With respect to those two factors, Defendants' arguments are
11 not compelling. Defendants contend that California Civil Code
12 section 2923.6(a) "encourages loan modifications only if
13 '[a]nticipated recovery under the loan modifications or work-out
14 plan exceeds the anticipated recovery through foreclosure on a net
15 present value basis." (Opp. at 7:1-3.) Defendants argue that,
16 based on this language, mortgage modifications are not intended to
17 affect the Plaintiffs because the "end aim" of mortgage
18 modifications is to maximize returns to the lender. (Mot. at 7:4-
19 5.) The full statute, however, reads:

20 [a] The Legislature finds and declares that any duty
21 that mortgage servicers may have to maximize net present
22 value under their pooling and servicing agreements is
23 owed to all parties in a loan pool, or to all investors
24 under a pooling and servicing agreement, not to any
25 particular party in the loan pool or investor under a
26 pooling and servicing agreement, and that a mortgage
27 servicer acts in the best interests of all parties to the
28 loan pool or investors in the pooling and servicing
agreement if it agrees to or implements a loan
modification or workout plan for which both of the
following apply:

(1) The loan is in payment default, or payment default is
reasonably foreseeable.

(2) Anticipated recovery under the loan modification or

1 workout plan exceeds the anticipated recovery through
2 foreclosure on a net present value basis.

3 Cal. Civ. Code § 2923.6. Read in its entirety, the statute does
4 not establish that the "end aim" of mortgage modification
5 transactions is to benefit lenders, but rather specifies that
6 servicers owe an equal duty to all investors in a loan pool and
7 defines what constitutes "acting in the best interests of the loan
8 pool parties."

9 As to Defendants' arguments regarding the second factor,
10 Defendants mischaracterize the FAC. Defendants argue that the FAC
11 alleges a foreseeable risk of foreclosure. (Opp. at 7:9-10.)
12 While the FAC does allege that default and "imminent foreclosure"
13 was one of the potential harms, the FAC also identifies "the
14 disclosure of sensitive information . . . [and] a forestallment of
15 Plaintiffs from looking sideways for other assistance with their
16 loan." (FAC ¶ 44.) Although not a model of clarity, this
17 paragraph does adequately allege that Defendants' acceptance of
18 Plaintiffs' loan modification application foreseeably caused
19 Plaintiffs to forego or abandon other efforts to meet their loan
20 obligations while their modification application was pending.

21 Plaintiffs do not, however, oppose Defendants' arguments with
22 respect to a majority of the Biakanja factors. Nor do Plaintiffs
23 address Defendants' arguments that Alvarez is distinguishable on
24 its facts. (Motion at 11.) Notably, and as discussed above,
25 Plaintiffs have not alleged that any foreclosure activity,
26 including the recording of a notice of default, has taken place
27 here. This fact, unlike the situation in Alvarez, bears on the
28 third, fourth, and fifth Biakanja factors and weighs against the

1 imposition of a duty. Furthermore, and unlike the plaintiff in
2 Alvarez, Plaintiffs here do not allege that Defendants mishandled
3 their loan application or otherwise erred in the processing of the
4 application. Indeed, the only wrongful conduct alleged in the
5 negligence cause of action, apart from the inapplicable section
6 2923.7 and 2924.10 claims described above, appears to be that
7 "Defendant forced Plaintiffs into delinquency by denying them a
8 loan modification wrongly and without explanation." (FAC ¶ 46.)
9 But, even assuming Defendants owed Plaintiffs a duty of care,
10 California Civil Code section 2923.4 states that although the
11 purpose of the California Homeowner Bill of Rights ("HBOR") is to
12 ensure that borrowers are considered for loss mitigation options
13 such as loan modifications, "[n]othing in the act . . . shall be
14 interpreted to require a particular result of that process." Cal.
15 Civ. Code § 2923.4. Thus, the mere denial of Plaintiffs'
16 modification application could not have constituted a breach of any
17 duty MGC might have owed to Plaintiffs.

18 Given the differences between the facts alleged here and those
19 in cases such as Alvarez, along with Plaintiffs' failure to address
20 Defendants' arguments regarding the majority of the relevant
21 factors, the court cannot conclude that Defendants owed Plaintiffs
22 a duty of care. Plaintiffs' negligence claim is, therefore,
23 dismissed.

24 D. Unfair Business Practices

25 Plaintiffs concede that their claim for unfair business
26 practices under California Business and Professions Code Section
27 7200 is predicated on their claims for negligence and HBOR
28 violations under sections 2923.7 and 2924.10. (Opp. at 15-21.)

1 Because those claims must be dismissed, as discussed above, so too
2 must Plaintiff's unfair business practices claim.

3 **III. Conclusion**

4 For the reasons stated above, Defendants' Motion to Dismiss is
5 GRANTED. Plaintiffs' FAC is DISMISSED, with prejudice.

6
7
8 IT IS SO ORDERED.
9

10
11 Dated: September 29, 2016
12



13 DEAN D. PREGERSON

14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28